IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 936 OF 1999.

Maharashtra Tourism Development Corporation, a body corporate incorporated under the Indian Companies Act, 1956, having its office at 9th floor, Express Towers, Nariman Point, Bombay 400 021. ... Appellant.

Versus.

1. Atur India Private Limited, a company registered under the Companies Act, 1956 having its office at Atur Chambers, 2-A, Moledina Road, Pune 411 001.

2. Baron Hotels Private Limited, a company registered under the Companies Act, 1956 having its office at Atur Chambers, 2-A, Moledina Road, Pune 411 001. ... Respondents.

Shri V.P.Sawant with Shri P.N.Mehta i/by M/s.Desai and Chinay for the Appellant.

Shri Vijay Thorat, Senior Advocate with Shri Uday Warunjikar for the Respondent No.1.

CORAM : ABHAY S.OKA, J.

DATED : 21st April, 2007.

ORAL JUDGMENT.

1. Submissions of the learned Counsel appearing for the parties were heard on the last date. The Appellant has taken an exception to the Judgment and Order dated 11th August 1999 passed by the trial Court on an application for temporary injunction filed by the

Respondents/Plaintiffs. With a view to appreciate the submissions made by the learned Counsel appearing for the parties, it will be necessary to briefly refer to the facts of the case. The Appellant/Defendant is the Maharashtra Tourism Development Corporation. On the basis of an advertisement published by the Appellant offering a long term lease in respect of the suit property, an offer was submitted by the Respondents. The property is a land including a super-structure at Panshet Road, Pune more particularly described in the plaint. After considering the offer of the Respondents the same was accepted by the Appellant. Accordingly on 19th January 2004, a Memorandum of Understanding was entered into between the Appellant and the second Respondent. The said MOU relates to Restaurant, Bar Kitchen and Acqua Sports Centre. As per the said Memorandum of Understanding (hereinafter referred to as the said MOU) it was agreed by and between the parties that the Appellant will execute a lease in respect of the property in question on the terms and conditions as appearing in the draft lease agreement appended to the said MOU. It was noted in the said MOU that the Appellant had not acquired a clear title from the Government in the Irrigation Department to execute the lease. The said MOU provides that a formal lease will be executed in due course in terms of the draft enclosed. The MOU provides that a sum of Rs.5 lakhs was

to be paid by the Respondents at the time of signing the same and the balance amount of Rs.26.78 lakhs was to be paid at a later stage. The possession of the property was handed over to the Respondents. The balance amount was to be paid within 30 days of the Respondent-company being informed of the receipt of marketable title by the Appellant. According to the case of the Appellant another Memorandum of Understanding was executed between the Appellant and the second Respondent on 15th March 1994. The said MOU relates to 38 rooms and other premises of Panshet Resort. By the said subsequent MOU the Respondents agreed to pay to the Appellant 4% of the gross receipts from the rooms rental of Panshet Resort on the said property collected by the Respondents. A draft of the Lease Deed was annexed to the said MOU.

2. The Respondents filed a suit praying that the MOU dated 19th January 1994 and 15th March 1994 were valid and subsisting and that they have a legal right to carry on all activities in pursuance of the said MOUs. A declaration is also claimed that the Respondents have a right to retain possession of the said property. A prayer was made for a perpetual injunction restraining the Appellants from taking possession of the suit property from the second Respondent. An application for temporary injunction taken out by the Respondents was contested by the Appellant by filing a reply. The

learned trial Judge by the impugned order dated 11th August 1989 allowed the application for temporary injunction by the following order:

> "Application is allowed as under: The Defendant-Corporation and its servants, officials are hereby restrained from taking possession of suit resort, centre/property from the plaintiffs and also restrained from disturbing the business of plaintiff No.2 in the suit property till disposal of suit. It is made clear that this order is made in view of notices issued by the defendant- corporation on 20/1/94 and 15/1/94 and this order will not bind the defendant-Corporation from recovering the amounts, if any, and balance amount after signing the lease deed. No order as to costs."

3. This Appeal is preferred by the Appellant for challenging the aforesaid order. At the stage of admission an order was passed by this Court on 14th December 1999 noting that the Respondents are in possession of the suit premises. In the order, this Court noted the contention of the Appellant that the Respondents are availing of all the facilities but are not paying the requisite amounts and there is a substantial amount due and payable by the Respondents to

the Appellant to the extent of Rs.1 crore. This Court observed that the Respondents cannot enjoy the premises gratuitously and enjoy the financial benefits. This Court, therefore, directed the Respondents to deposit a sum of Rs.40 lakhs in this Court within a period of 12 weeks. The said order passed by this Court was challenged by the Respondents by filing a Special Leave Petition. By order dated 7th February 2000, the Special Leave Petition was allowed to be withdrawn on a statement made by the Counsel appearing for the Respondents that the Respondents will approach this Court by filing a Review Application. It must be stated here that on 28th April 2000 this appeal came up for admission before this Court. The Appeal was admitted and the earlier interim order dated 14th December 1999 was continued. The Application for review made by the Respondent was rejected by this Court by order dated 8th February 2002. The order passed in Review Petition was challenged by filing a Special Leave Petition. The Special Leave Petition was disposed of by order dated 8th July 2002 by directing this Court to hear the appeal expeditiously and if possible within three months. It was observed that it will be open for the Respondents to seek modification of the order of this Court to the effect that instead of depositing a sum of Rs.40 lakhs in cash, they may furnish bank guarantee in the said amount. Accordingly an application for modification was

made in this Court which was rejected by order dated 17th August 2002.

4. It was pointed out by the learned Counsel appearing for the Appellant that the Respondents have not deposited the sum of Rs.40 lakhs as directed by this Court by order dated 14th December 1999. It is submitted that the Respondents have been enjoying all the facilities on the property of the Appellant and are not paying various amounts including the lease rent. A submission is made that the Respondents are trying to take undue advantage of the fact that the Appellant could not obtain the necessary clearance from the State Government to enable the Appellant to execute the lease deed. The learned Counsel for the Appellant submitted that the Respondents are defaulters.

5. The learned Senior Counsel appearing for the Respondents submitted that in the year 2006 proceedings have been initiated at the instance of the Appellant against the Respondents under section 4 of the Bombay Government Premises Eviction Act, 1955 and a show-cause notice has been already issued alleging that a sum of Rs.11 crore and more is due and payable by the Respondents to the Appellant. He submitted that now all the issues will be decided in the proceedings under the said Act of 1955. He submitted that the Respondents are

ready and willing to give a bank guarantee in the sum of Rs.40 lakhs in terms of the order passed by this Court. He has invited my attention to the various findings recorded by the trial Court and submitted that the trial Court has recorded a finding that there is no default on the part of the Respondents in payment of the amount. He submitted that the Appellant has declined to perform reciprocal promise by executing a lease and therefore, the Appellant cannot now contend that the Respondents have committed default in payment of lease rent. He submitted that the liability of payment of lease rent will arise only after the lease is executed and the Appellant has committed default by not executing the lease. He submitted that the impugned order is a discretionary order of temporary injunction which has the effect of protecting the possession of the Respondents. He submitted that no interference was called for with the discretionary order. The learned Senior Counsel also pointed out that the Appellant has filed a money suit against the Respondents for recovery of a large amount of money and therefore, the Appellant will get the amount if they succeed in the said suit.

6. I have considered the submissions made by the learned Counsel appearing for the parties. It is not in dispute that from the year 1994, the Respondents are in possession of the resort and are running various

activities therein and are earning returns. Even according to the case of the Respondents, there are facilities of Restaurant, Bar, Kitchen Acqua Sports Centre etc. in the said Resort. This Court while passing order dated 14th December 1999 has primafacie observed that substantial amount is due and payable by the Respondents to the Appellant and the Respondents cannot be allowed to use the premises gratuitously and enjoy the financial benefits. Therefore, a direction was given to deposit a sum of Rs.40 lakhs in this Court within 12 weeks. It must be noted here that the said order has attained finality as the same has been confirmed by the Apex Court in the Special Leave Petition filed by the Respondents which was withdrawn on the ground that the Respondents desired to apply for review of the said order. The Review Application has been rejected. Thereafter in terms of the liberty granted by the Apex Court in the Special Leave Petition filed for challenging rejection of the Review Petition, an application was filed for modification of the said order passed by this Court on 14th December 1999. The modification sought was that instead of depositing the cash amount, the Respondents may be permitted to furnish bank guarantee in the sum of Rs.40 lakhs. The said application was also rejected. Rejection of the said application for modification has also attained finality. It is thus obvious that the Respondents have committed

breach of the order passed by this Court on 14th December 1999 directing them to deposit a sum of Rs.40 lakhs. The Application for modification of the said order was rejected by this Court on 17th August 2002. Thereafter no attempt has been made by the Respondents to comply with the order passed by this Court in December 1999. In fact not a single farthing is deposited by the Respondents in this Court.

7. The object of passing the said order as is clear from the said order was that the Respondents cannot be allowed to enjoy the facilities in the resort without paying the amount due and payable to the Appellant. From December 1999 for a period of 7 years and more, the Respondents have not complied with the said order and on the other hand they have been enjoying the facilities.

8. Even as of today the offer given by the Appellant is not of depositing the amount but of furnishing a bank guarantee. The request for modification of the order dated 14th December 1999 has been rejected long back. Initiation of proceedings under the said Act of 1955 or filing of a suit will not help the Respondents. They have not complied with the order passed by this Court for a period of 7 years and more. As the Respondents have not paid the amount obviously the Appellant was forced to file a money suit.

Advantage of of their own default cannot be taken by the Respondents.

9. Grant of temporary injunction is always a discretionary and such a relief has to be granted on equitable considerations. If the equity is not in favour of the party applying for temporary injunction, it is always open for the Court to decline the relief of temporary injunction on equitable considerations.

10. The Respondents have defied the order passed by this Court on 14th December 1999 and even as of today have not shown willingness to comply with the said order. On the contrary an offer is made to furnish bank guarantee which was rejected way back in the year 2002. Continuation of discretionary relief of temporary injunction in favour of such a litigant cannot be permitted and such a litigant who has defied the order of this Court for a period of 7 years and more cannot be allowed to enjoy equitable relief granted by the trial Court. Only on this ground, the impugned order deserves to be quashed and set aside.

11. Hence the following order is passed:

(i) The impugned order dated 11th August 1999 is quashed and set aside and application at Exh.5

made by the Respondents in Special Civil Suit No.887 of 1999 stands dismissed.

(ii) It is made clear that all contentions of the parties on merits of the suit are expressly kept open.

(iii) The Respondents to pay costs of Rs.10,000/- to the Appellant within a period of 8 weeks from today.

(iv) The Appeal is accordingly allowed.

(v) The parties to act on an authenticated copy.

(vi) The learned Counsel for the Respondents prays that operation of this order may be stayed to enable the Respondents to challenge the said order. The said request is opposed by the learned Counsel appearing for the Appellant. Considering the fact that it may not be possible to immediately make available a copy of this Judgment to the Respondent, the operation of this order will remain stayed till 11th June 2007.

Judge.